

**KEVIN T. BLOCKER**  
Claimant

**CITY OF TOPEKA**  
Respondent  
Self-Insured

## ORDER

## APPEARANCES

## RECORD AND STIPULATIONS

## ISSUES

The ALJ found claimant suffered a work-related injury to his left wrist on October 4, 1999. Following surgery on May 30, 2000, claimant was released to return to work on June 9, 2000. Claimant worked with light duty restrictions from June 9, 2000 through October 23, 2000, and during that time he was not permitted to work overtime. Accordingly,

claimant earned less than his pre-injury average weekly wage. Nevertheless, temporary partial disability compensation was denied as claimant suffered a scheduled injury.<sup>1</sup> The ALJ adopted the rating opinion of Dr. Bieri the court appointed independent medical examiner and found claimant suffered a 24 percent impairment of function to his left forearm. In addition, even though claimant's injury was an aggravation of a preexisting condition, the ALJ found respondent is not entitled to a credit because the condition was asymptomatic before the work-related injury.<sup>2</sup>

Claimant argues that he suffered a higher percentage of functional impairment and that he is entitled to either temporary partial or temporary total disability compensation for the 19.43 week period that he was working full time for respondent under light duty restrictions that prevented him from working over 40 hours per week and thus prevented him from earning overtime pay. Claimant further argues that respondent should not receive any credit for a preexisting impairment.

Respondent argues that the ALJ's reliance on the rating by the court-ordered examining physician was reasonable but that respondent should receive a credit for claimant's preexisting impairment. In the alternative, respondent asks that the ALJ's Award be affirmed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that the ALJ's Award should be affirmed.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.<sup>3</sup>

And functional impairment is defined by K.S.A. 44-510e, as follows:

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<sup>1</sup>See K.S.A. 44-510d(b) and *Ledbetter v. Constair Plastics*, No. 205,252, 1996 WL 670520 (Kan. WCAB Oct. 6, 1996).

<sup>2</sup>K.S.A.1999 Supp. 44-501(c).

<sup>3</sup>K.S.A. 1999 Supp. 44-501(c).

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Also, K.S.A. 44-510d(a)(23) provides:

Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Consequently, by definition the Act requires that preexisting functional impairment be established by competent medical evidence and ratable under the appropriate edition of the AMA *Guides*, if the condition is addressed by those *Guides*.<sup>4</sup>

The Act neither requires that the functional impairment be actually rated before the subsequent work-related accident nor that the worker had been given work restrictions for the preexisting condition. Instead, the Act only requires that the preexisting condition must have actually constituted a ratable functional impairment.<sup>5</sup>

Claimant's work-related injury was an aggravation of his preexisting Keinbock's disease. However, that condition was asymptomatic before the October 4, 1999 accident. Moreover, no physician testified that claimant had a preexisting impairment that was ratable under the *Guides*. Accordingly, claimant's percentage of preexisting impairment, if any, was not proven.<sup>6</sup>

Dr. Bieri gave claimant a combined rating of 24 percent all of which he attributed to the work-related injury. He specifically noted that "[t]he claimant had no pre-existing symptomatology."<sup>7</sup> Accordingly, Dr. Bieri did not attribute any portion of his 24 percent functional impairment rating to a preexisting condition. The ALJ awarded claimant a 24 percent permanent partial disability to the level of the forearm. The ALJ did not reduce the

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<sup>4</sup>American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

<sup>5</sup>See *Watson v. Spiegel, Inc.*, No. 85,108 (Kansas Court of Appeals unpublished opinion filed June 2, 2001); *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion filed June 9, 2001).

<sup>6</sup>See *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

<sup>7</sup>Independent Medical Examination from Peter V. Bieri, M.D., at 4 to The Honorable Brad E. Avery dated April 23, 2003.

award for any preexisting impairment under K.S.A. 44-501(c). Furthermore, the ALJ denied claimant an award of temporary partial disability compensation as claimant's injury is a scheduled injury under K.S.A. 44-510d as opposed to an injury to the body as a whole under K.S.A. 44-510e. Only K.S.A. 44-510e makes reference to temporary partial disability compensation and K.S.A. 44-510d(b) provides that "compensation for a specific injury under the foregoing schedule. . . shall be exclusive of all other compensation. . . ." The ALJ was correct to deny temporary partial disability compensation for a scheduled injury and claimant did not meet the definition of being temporarily and totally disabled after he was released and returned to light duty work.<sup>8</sup>

The Board finds the ALJ's Award contains an accurate recitation of the facts and law. The Board adopts those findings and conclusions as its own.

**AWARD**

**WHEREFORE**, it is the finding of the Board that the Award entered by Administrative Law Judge Brad E. Avery dated March 17, 2004, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant  
Larry G. Karns, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>8</sup>See K.S.A.44-510c(b)(2).